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No. 85-5893

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

GREGORY CHANDLER, Petitioner

v.

UNITED STATES OF AMERICA, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

THOMAS R. ASHLEY
COUNSEL OF RECORD

RONALD C. HUNT
On the Petition

ASHLEY AND CHARLES
24 Commerce Street
Suite 1526
Newark, New Jersey 07102

QUESTIONS PRESENTED

1. Whether the District Court's erroneous computation of the seventy-day period between the filing of the indictment and trial was erroneous, thus mandating the dismissal of the indictment.

2. Whether the Police Officer's warrantless search and seizure of evidence from petitioner's premises violated the Fourth Amendment, where the officer employed coercive threats in order to obtain consent to search from a third party who had no authority to give consent.

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ORDERS BELOW

The Orders of the Court of Appeals for the Third Circuit and the District Court for the District of New Jersey all appear in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on September 26, 1986. This petition for certiorari was filed within 60 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Amend. IV:

> "The right of the people to be secure in their persons, homes, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or the place to be searched and the persons or things to be seized."

18 UNITED STATES CODE 3161 PROVIDES IN PART:

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs....

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay.....

(f) ....resulting from any pretrial motion.....

18 U.S.C. Sec. 3162 provides in part:

(a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant....

18 U.S.C. Sec. 3174 provides in part:

....The Government may move to suspend [18 U.S.C. 3161 (c) (1)]

STATEMENT OF THE CASE

How Federal Questions Are Presented

1. On July 5, 1985, defendant Chandler moved to dismiss the indictment entered against him in this matter for violating the Speedy Trial Act, 18 U.S.C. Sec. 3161 et seq., which requires that a defendant be brought to trial within seventy days of the defendant's initial appearance before a magistrate of the filing of an indictment, whichever is the latest. 18 U.S.C. Sec. 3161(c)(1). Defendant requested the court to dismiss said motion without prejudice, which the court willingly granted. (Appendix at 1-3)[1] The court also issued its findings as to the number of excludable days for the Act's purposes. In its findings, the court ruled that the seventy day requirement was not violated since the pre-trial activity involved in this case excluded a large number of days from the computation

1. Defendant Chandler raised the issue once again, immediately prior to trial. The Court dismissed the motion with prejudice, based on its original findings. (Appendix at 5-7)

of the seventy day period. (Appendix at 4) The defendant contends that this computation was clearly erroneous.

2. On September 4, 1985, the District Court found after hearing testimony on defendant's motion to suppress evidence, that a pair of brown work boots and a black ski mask was seized from Michael Chandler's bedroom. In addition, the court found that $2,050.00 was seized from the defendant's bedrooom and that the seizure of this money was not in violation of the Fourth Amendment because the defendant's mother, Gloria Chandler consented to the search. (Appendix at 27.16) The Court also found that Gloria Chandler, the person with authority over the apartment, consented to a search of only the defendant's bedroom. Based on these findings, the district court suppressed evidence of the black ski mask and brown work boots because the seizure of the two items were beyond the scope of Gloria Chandler's consent. (Appendix at 35.11)

The government moved the Court to reconsider its original findings. On reconsideration, the Court allowed the brown work boots to be admitted into evidence because the defendant lacked standing to challenge the seizure of evidence from his brother's room. (Appendix at 47.13) The court also admitted the black ski mask into evidence finding that the mask was seized from the defendant's bureau drawer and, as a result, was within the scope of Mrs. Chandler's consent. (Appendix at 47.10 to 49.17)

Petitioner respectfully submits that the Court's failure to suppress the seizure of the black ski mask, brown work boots, and $2,050.00 was clearly erroneous and constitutes reversible error.

The Motion to Suppress

Petitioner Gregory Chandler, on parole for bank robbery, was arrested on January 8, 1985 by F.B.I. Agent Gary Rohen and various members of the Newark Police Department

for suspicion of bank robbery. (Appendix at 38.19) The basis for the arrest of Chandler stemmed from statements made by one Johnny Trammel, who allegedly confessed to the law enforcement officials that the two of them, along with Robert Hillsman and John Good, were involved in a series of bank robberies. (68.146) Thus, armed with this uncorroborated information, the law enforcement officers arrested petitioner Chandler in his apartment at 515 Elizabeth Avenue, Newark, New Jersey. The arrest was conducted without a warrant, primarily because the officers "believed" that Chandler knew of their presence in the building. (Appendix at 36.20-22)

After arresting Chandler, some of the investigating officers remained in the apartment. (Appendix at 26.12-13) The alleged purpose for their remaining in the apartment was to prevent the destruction of evidence while a consent to search form was being obtained. (Appendix at 36.1-7) This took well over an hour. In the

interim, Gloria Chandler, the petitioner's mother, was spoken to over the telephone and apprised of the situation by her son, Michael. (Appendix at 27.4) Agent Rohen also spoke to her, stating that if she did not consent that he would simply get a search warrant from a judge. (Appendix at 27.7) Mrs. Chandler claimed that Rohen threatened to tear her apartment apart if she refused to consent. Although Michael Chandler heard the threat being made, the Court found that allegations of a threat were incredible. (Appendix at 27.10) This finding was made despite the fact that Detective Barry Collicelli lied about being present in the apartment when Agent Rohen spoke to Mrs. Chandler. (Appendix at 26.20) As a result, Agent Rohen's denial of a threat was never corroborated.

Thus, the Court found that Mrs. Chandler allegedly agreed to a search, but clearly stated that the search should be limited to the petitioner's room. (Appendix at 27.16) The officers,

however, searched both the defendant's room and Michael's room. (Appendix at 26.1) As a result, they found $2,050.00, a black ski mask, and a pair of brown work boots. (Appendix at 28.10-16)

The three items seized were the subject of a suppression hearing on July 31 and August 1, 1985. On September 4, 1985, the District Court found that although Chandler was a rent paying tenant, Mrs. Chandler had common authority to consent to a search of any room in the apartment. (Appendix at 28.2) The court also ruled that her consent was freely and voluntarily given.

The District Court ruled further that the officer's search of Michael's room was beyond the scope of Mrs. Chandler's consent. Thus, because the credible testimony demonstrated that all of the items except the $2,050.00 were found in Michael Chandler's room, the court suppressed the work boots and the ski mask. (Appendix 34.4-11) The government filed a motion for reconsideration on September 4, 1985. On

September 13, 1985, the district court reversed itself and held all of the seized material admissible for trial. (Appendix at 46.17-48.21)

The court based its decision on the fact that the petitioner lacked standing to challenge seizure of evidence from his brother's room. (Appendix at 47.13) [2] Said rulings were affirmed by the Court of Appeals for the Third Circuit on August 7, 1986. (Appendix at 8-10)

Thereafter on September 26, 1986 a motion for rehearing was filed by petitioner and denied by the Third Circuit. (Appendix at 11)

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2. The issue of standing relates only to the police officer's finding of the work boots in Michael Chandler's room. As to the issue of the ski mask, the court found that the mask was seized from the petitioner's bureau drawer inside his bedroom, (Appendix at 47.10) and was within the scope of Mrs. Chandler's consent. (Appendix at 48.17)

LEGAL ARGUMENT

POINT I

WHETHER THE DISTRICT COURT'S COMPUTATION OF THE SEVENTY DAY PERIOD BETWEEN THE FILING OF THE INDICTMENT AND TRIAL WAS ERRONEOUS; THUS, MANDATING DISMISSAL OF THE INDICTMENT

The petitioner contends that the District Court's computation of the filing of the indictment against him, violated the Speedy Trial Act, 18 U.S.C. Sec. 3161 et seq. Primary among the Act's purpose is the requirement that a defendant be brought to trial within seventy days of either the indictment or first appearance before a judicial officer. However, the Act recognizes and permits the exclusion of delay periods caused by specific kinds of pretrial activity from the computation of this seventy-day period. 18 U.S.C. Sec 3161(h). Thus, the Act can be viewed as serving a dual purpose in furthering the interest of both criminal defendants and the public in a speedy trial:

> Speedy trial may be of concern to the defendant as he may want to preserve the means of proving his defense, to avoid a long period of pretrial imprisonment or conditional release, and to avoid a long period of anxiety and public suspicion out of the accusation. From the point of view of the public, a speedy trial is necessary to preserve the means of proving the charge, to maximize the deterrent effect of prosecution and to avoid, in some cases, an extended period of pretrial freedom during which time he may flee, commit other crimes, or intimidate witnesses. United States v. Pringle, 751 F.2d 419, 429 (1st Cir. 1984) (citing Standards Relating to Speedy Trial, Sec. 1.1 Commentary (1968).

The Act controls the conduct of the parties and the court itself during the pretrial proceedings. As such, the court must police itself as well as the behavior of the prosecutor and defense counsel in order to avoid impermissible delays. Pringle, 751 F. 2d at 429. Thus, to avoid such delays, the Act imposes two sanctions. The first sanction, 18 U.S.C. Sec. 3162(b) punishes counsel for dilatory tactics, regardless of whether the seventy-day limit has been exceeded. The second sanction 18 U.S.C. Sec. 3162(a) (2),

allows for the dismissal of a defendants indictment with or without prejudice if in fact, the seventy-day limit has been exceeded, either as a result of counsel's dilatory tactics or delays caused by the court itself. See Pringle, 751 D. 2d at 429.

To determine whether the seventy-day limit of the Act has been violated, the District Court must start from scratch in the computation of excludable and non-excludable time pursuant to the Act.

It is clear that the starting point of the seventy-day period begins when the defendant first appears before a judicial officer or when the indictment is filed, whichever occurs later. 18 U.S.C. Sec. 3161(c) (1). In this case, defendant Chandler appeared before a magistrate on January 9, 1985, but the indictment was not filed until January 17, 1985. Thus, January 17, 1985 is the date in which we begin our computation of the seventy-day period.

See United States vs. Carrasquillo, 667 F. 2d 382, 384 (3rd Cir. 1981) (court held that where a defendant makes a pre-indictment appearance before a judicial officer of the court in which a charge is pending, the subsequent filing of the information or indictment triggers the seventy-day period during which trial must commence.)

Under 18 U.S.C. Sec. 3161(h)(1), any proceeding concerning the defendant is excludable. Thus, the day of the indictment is excludable, as well as the day petitioner was arraigned and a bail hearing took place. Moreover, the date on which counsel for the petitioner requested and was granted an extention (April 19, 1985), as well as the period of time spanning the filing of Petitioner's pre-trial motions (April 25, 1985) until said defendant's receipt of the Government's responding papers (May 20, 1985) are excludable pursuant to 18 U.S.C. Sec. 3161(h)(1) (f), which provides

for the exclusion of delays resulting from any pre-trial motion. See United States vs. Novak, 715 F. 2d 810 (3d Circ. 1983) (Defendant Arabia asked for an extension on June 1, 1982, which was granted on June 2. The defendant filed a brief on June 8 and the Government answered on June 21. Thus, the two days (June 1 and 2) and the fourteen (June 8-21) days were held excludable). Finally, petitioner Chandler's attorney made two appearances before the Honorable Harold A. Ackerman, the U.S. District Court assigned to this case, on April 9, 1985 and June 24, 1985. Accordingly, the said two days are "excludable" pursuant to the Act.

With respect to the effect of the hearing of pre-trial motions which have been postponed by a Court, a Third Circuit Court has imposed a "reasonableness" standard on the computation of excludable time pursuant to 18 U.S.C. Sec. 3161 (h)(1)(f). In Novak, supra, 715 F 2d

810 (3d Cir. 1981), the Court held that the "permissible exclusions applicable to pre-trial motions begin with the filing of a motion and run only "for a period of time that is reasonably necessary to conclude a hearing on the matter or to complete the submission of the matter to the court for a decision." Id. at 820. Thus, long postponements of hearing dates will not qualify for exclusion under sub-section f. unless the District Court finds that it is reasonably necessary to ready the motion for judicial consideration. Id.

The same standard has been adopted by the Second Circuit in United States vs. Cobb, 697 F. 2d 83,44 (2d Cir. 1982):

> We conclude that the period of allowable excludable delay applicable to a pre-trial motion begins automatically with the making of the motion and runs for a period of time that is "reasonably necessary" to conclude a hearing or to complete the submission of the matter to the court for decision. Under this view, long postponements of hearing dates, unless reasonably necessary would not qualify as excludable time, nor would

unnecessarily long extensions of time for the submission of papers. United States v. Cobb, 697 F.2d 38, 44 (2d Cir. 1982).

It is clear that long postponements of a hearing for defendant's pre-trial motions are patently unreasonable. While setting the hearing date down for May 31, 1985, was reasonable, postponing the hearing for no apparent reason until June 18 should and must be considered unreasonable. The fact that yet another postponement was ordered, thereby voiding the June 18 hearing date, is a clear example of the type of dilatory conduct that the Act was designed to remedy. The last motion filed by petitioner Chandler in this case prior to the Speedy Trial Motion was April 25, 1985. Thus, approximately nine weeks had gone by without a hearing. The motions filed by the petitioner were not complex or time consuming. There had been no announcement by the court that the delay in hearing the pre-trial motions was "reasonably necessary to ready them for judicial determination". In fact, just the opposite seems to have been

true, given the fact that two hearing dates had previously been set and then cancelled. The petitioner fully submits and rightfully so, that these postponements were not in any way caused by him or his counsel. Hence, the court must only exclude the time from the petitioner's filing of his pre-trial motions to the date on which the first hearing was set (April 25 - May 31).

The same rationale applies to the days remaining up through and until the beginning of the petitioners trial on September 10, 1985. The time period between the date of the filing of the petitioner's motion for relief under the Act until the resolution of the matter on July 11, 1985 is excludable. In addition, the dates in which the District Court finally heard the petitioner's pre-trial motions are excludable. Finally, the time period between the date of the government's filing of the motion for reconsideration until the hearing of that motion is excludable.

Below is a summary of the excludable day from January 17, 1985 up through the filing of the petitioner's original Speedy Trial Act motion on July 5, 1985:

January 17, 1985, the date on which the indictment was filed.	1 day
Reappearance before Magistrate Serena Perretti in February	1 day
Defendant's request for extension of time to file pretrial motions April 19, 1985	1 day
Date of filing of petitioner's motions for severance and particular pre-trial relief to first hearing on same, April 25, 1985-May 31, 1985	37 days
Appearances by Thomas R. Ashley on behalf of petitioner Chandler, April 9, 1985 and June 4, 1985 before Judge Ackerman	2 days
	55 days

Thus, out of a total of 170 days, only 55 are excludable. Clearly, the remaining 115 days constitute a gross violation of the spirit and purpose of the Speedy Trial Act.

One final point is an order with respect to the computation of excludable days. Although Thomas R. Ashley was substituted by the Court on March 25, 1985, to represent petitioner Chandler, said representation had no impact on the computation of excludable days. It is contended that the Government could raise the argument that the first thirty days subsequent to Ashley's substitution as counsel for petitioner should be excluded pursuant to 18 U.S.C. Sec. 3161 (c) (2), which prohibits the petitioner from going to trial for at least thirty days following the petitioner's first appearance through counsel. In United States vs. Richmond, 735 F. 2d 208 (6th Cir. 1984), the Court held that Sec. 3161 (c) (2) contains no provision for the exclusion of time from the seventy-day period. Thus, the Court refused to hold that the thirty-day prohibition constitutes excludable time whenever a petitioner substitutes counsel. Id. at 214. Accordingly, this Court

should find that the thirty-day prohibition of Sec. 3161(c) (2) should not be construed to constitute "excludable" days.

Unquestionably, there was a gross violation of the Act's seventy-day limit. Thus, a dismissal of petitioner Chandler's indictment is in order. Petitioner contends that, given the facts of the case, said dismissal must be with prejudice.

Section 3162(a) (2) of the Act provides for the dismissal, with or without prejudice, of a defendant's indictment where it has been established that the seventy-day provision of Sec. 3161(c) (1) has been violated. Accordingly, in United States vs. Carrasquillo, supra, the Court concluded therein that a dismissal with or without prejudice depends on factors such as the seriousness of the offense, the circumstances leading to dismissal, and the impact reprosecution would have on the administration of justice. 667 F. 2d 382 (3d Cir. 1981); Sec 3162 (a) (2).

Based on these factors, the Court must conclude that the indictment should be dismissed with prejudice. First while the crime of bank robbery is a serious offense, it is not one of the more heinous crimes that a court has had to grapple with. Moreover, petitioner Chandler used no weapon in the commission of the alleged crimes, nor did he injure anyone. Further, the amount which was allegedly stolen was a relatively small amount. Second, the Government has done nothing to prevent a violation of the Act. If, in fact, violation of the seventy-day rule was inevitable, the Government could have moved to suspend the requirement under 18 U.S.C. Sec. 3174(e). As a result, the Government did not live up to its shared responsibility for speedy trial enforcement. United States vs. Perez-Reveles, 715 F. 2d 1348, 1353 (9th Cir. 1983). Finally, if the indictment is dismissed without prejudice, the Government, as well as the judiciary's failure to properly administer

the Speedy Trial Act will go without proper and effective reprimand. As such, there is no reason to believe that the dismissal of petitioner's indictment, with prejudice, will impede in any significant manner the administration of justice.

POINT II

WHETHER THE POLICE OFFICERS' WARRANTLESS SEARCH AND SEIZURE OF EVIDENCE FROM PETITTIONER'S PREMISES VIOLATED THE FOURTH AMENDMENT, WHERE THE OFFICER EMPLOYED COERCIVE THREATS IN ORDER TO OBTAIN CONSENT TO SEARCH FROM A THIRD PARTY WHO HAD NO AUTHORITY TO GIVE CONSENT.

The petitioner contends that the District Court erred in allowing the introduction of evidence seized in violation of the Fourth Amendment to the United States Constitution.

A. The police officers' illegal presence in the Chandlers' apartment violated the Fourth Amendment.

Prior to Segura vs. United States, 104 S. Ct. 3380 (1984), the Supreme Court had never considered whether, when officers have probable cause to believe that evidence of criminal activity is on the premises, the temporary securing of the premises to prevent the removal or destruction of evidence violates the Fourth Amendment. It is clear, however, that the Court has indicated that the securing of the premises, when it is

done to preserve the status while a search warrant is being sought, is not unreasonable under the Fourth Amendment. For example, in Rawlings vs. Kentucky, 448 U.S. 98, 100 S. Ct. 2556, 65 L.Ed. 2d 633 (1980), the Court did not question the admissability of evidence obtained pursuant to a warrant that was issued while the police officers were securing the defendant's premises. Id. And in Mincey vs. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), the Court approved a police officer's guarding of an apartment while a search warrant was being obtained. Id.

The Segura case, consequently, is the first case to explicitly rule on the issue. In that case, the Court held that the securing of a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not an unreasonable seizure of the dwelling or its contents. Segura, supra, 104 S. Ct. at 3389.

It is clear that Segura does not support the the government's presence in the apartment and furthermore, evinces a clear attempt by the government's police officers to coerce a consent out of Gloria Chandler. In the instant case, the police officers were securing the premises not to procure a search warrant as was the case in Segura but rather, to obtain a consent to search form. (68.9-23). The form was requested by the on-site police officers not because they already had Mrs. Chandler's consent and wished to memorialize it; rather, the form was obtained because they "anticipated" getting Mrs. Chandler's consent. Thus, in the instant case, we are faced with a situation in which police officers remained in the Chandler's apartment without any of the residents' permission and without any indication that consent to search the apartment would be freely and voluntarily given prior to the officers' acquisition of a consent to search form. One message becomes clear from the police officers' conduct:

they will stay in the petitioner's apartment until someone consents to a search of the apartment. This inescapable conclusion demands that this Court invalidate the entire search of the petitioner's apartment.

B. Mrs. Chandler's alleged consent was coerced.

The seminal case in the "consent to search cases:

> [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, expressed or implied. Schneckloth, supra, 412 U.S. at 248.

Accordingly, where there is coercion, there cannot be consent. Bumper vs. United States, 381 U.S. 543, 550, 550, 88 S. Ct. 1788, 20L.Ed.2d 797 (1968). Thus, the "question whether a consent to search was in fact voluntary or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of the circumstances." Schneckloth, supra, 412 U.S. at 227.

Given the facts outlined herein, it cannot be said that Mrs. Chandler freely and voluntarily consent to a search. The presence of the police officers in her apartment without a search warrant and without the permission of the occupants, clearly establishes a prima facie showing of coercion. It also establishes that the testimony of Michael and Mrs. Chandler, i.e., that the officers threatened to wreck the apartment if Mrs. Chandler did not consent, is believable and not incredible, as the court so found. If Mrs. Chandler had refused her alleged consent, the officers would have had to leave the premises empty-handed. Thus, the officer clearly had a reason to threaten Mrs. Chandler.

Notwithstanding the existence of a threat, the instance of the officers' presence in the apartment while she was at the hospital still indicates that any consent allegedly given by Mrs. Chandler was coerced. The Government bears the burden of showing that consent was freely and voluntarily given "and not simply acquiescence

to a claim of lawful authority." United States vs. D'Allerman, 712 F.2d 100,103 (5th Cir.1983). Thus, her giving of consent does not preclude a Fourth Amendment claim where an individual feels he has no alternative to compliance and merely mouths pro forma words of consent. United States vs. Elsoffer, 671 F.2d 1294,1298(11th Cir.1981).

Under the totality of the circumstances, it is clear that the consent to search petitioner's room was merely "pro forma words of consent" by Mrs. Chandler. Petitioner's mother, who was not home at the time, allegedly consented to a search of the apartment only after speaking to one of the police officers on the phone. Since the officers were already in the apartment, Mrs. Chandler really had no alternative but to comply with the officer's demands. Accordingly, this Court must find that Mrs. Chandler did not freely and voluntarily consent to a search of the defendant's room.

C. Assuming, arguendo, that Mrs. Chandler's consent was valid, the District Court erred in finding that Mrs. Chandler had authority to consent to a search of the petitioner's room.

For a third person to give consent to search, he must have authority to give it. Stoner vs. California, 376 U.S. 483, 84 S. Ct. 889, 11 L.Ed.2d 856 (1964). Such authority may be based simply upon the fact that:

> ...the third person shares with the absent target of the search a common authority over, general access to, or mutual use of the place or object sought to be inspected under the circumstances that make it reasonable to believe that the third person has the right to permit the inspection in his own right and the absent target has assumed the risk that the third person may grant permission to others. See United States vs. Matlock, vs. Matlock, 415 U.S. 164, 171 and n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

However, a third person's consent can never validate a warrantless search when the circumstances provide no reasonable basis to harbor a belief that shared or exclusive authority to permit inspection exists in the third person from any source. Stoner, supra, 376 U.S. at 489. Nor can it validate a warrantless search under circumstances which evince that the absent target has an expectation of privacy in the place despite some appearance

or claim of authority by the third person. United States ex rel. Cabey vs. Mazurkiewica, 431 F.2d 839 (3d Cir. 1970). Finally, when the retained right of privacy is manifest in the circumstances and the third person actually disclaims right of access, then a warrantless search based on said third person's consent will be invalidated. United States vs. Wilson 536 F. 2d 883 (1976).

In the instant case, the petitioner was living in his mother's apartment as a paying tenant. (62.18). As a result, he had the same expectation of privacy as one who rents a room in a hotel or rents an apartment from a landlord. Chapman vs. United States, 365 U.S. 610, 81 S.Ct. 776, L.Ed.2d 828 (1961) (Landlord may not consent to a search of premises leased by his tenant.) Clearly, defendant's room was set aside for his own exclusive use and no one--not his mother or his brother had the right to consent to a search of said room.

In Reeves v. Warden,346 F.2d 951 (4th Cir. 1965) the Court found that a member of a household who had general access to her son's room in a home had no authority to consent to a search therein of a bureau drawer set aside exclusive for the son's use. That principle of "exclusivity" is also present in the instant case. The petitioner, his mother and his brother, had general access to common areas of the apartment--the living room, kitchen and bathroom---but each one maintained exclusive control over his/her room. Thus, the alleged consent of petitioner's mother, even though she arguably might have had the appearance of authority from her status as the "owner" of the apartment, could not validate the search of his room. In Mazurkiewica, supra, the wife of a realtor had stored their household goods. The court invalidated the search. In reaching its conclusion, the court noted:

> It is fundamental that the doctrine which recognizes the validity of a third party's consent to a search must be applied guardedly to prevent erosion of the protection of the Fourth Amendment, since it makes no requirement of the existence of probable cause for the search and does not constitute an exception based on necessity. Mazurkiewica, supra, 431 F.2d at 843.

Thus, the Court in Mazurkiewica held that the wife did not have an equal right of access to the garage, and therefore had no independent right of her own to consent to the search. Ibid at 843. Application of Mazurkiewica to the instant case demands the same result. Petitioner's mother clearly had no equal right of access to his room; in fact, petitioner was responsible for its care and upkeep. Even if we assume, as the district court found, that Mrs. Chandler had general access to the petitioner's room to clean, that still does not give her the right to consent to those areas of exclusivity; a suitcase, a bureau drawer, or even under a mattress.

D. The petitioner has standing to challenge the seizure of his property from his brother's room.

The district court permitted the government to use evidence of a pair of brown work boots and ski mask seized from Michael Chandler's bedroom to be used at trial against the defendant. The Court ruled that although the search and seizure of these items from Michael's room was beyond the scope of Mrs. Chandler's consent, the defendant lacked standing to challenge the validity of the seizure. (75.13)

It is undisputed that "Fourth Amendment rights may not be vicariously asserted." Rakas vs. Illinois, 439 U.S. 128, 133-134 (1978). Rakas and its progeny, however, do not stand for the proposition that a person aggrieved by an illegal search and seizure of incriminating evidence from a third party's premises will never have standing to assert a Fourth Amendment claim; rather, in determining whether a person may raise a Fourth

Amendment claim; the Court must consider whether the person has a possessory or proprietary interest in the place or items being seized. United States vs. Salvucci, 448 U.S. 83, 92-93 (1980).

In order to merit constitutional protection under the Fourth Amendment, an individual's subjective expectation of privacy must be "one that society is prepared to recognize as reasonable." United States vs. Taylor, 515 F. Supp. 1321, 1326 (D. Me. 1981) (citing Katz vs. United States, 389 U.S. 347, 361 (1967) (Harlan J., concurring). Thus, in United States VS. Alberts, 721 F.2d 638 (8th Cir. 1983), the Court, in holding that defendant Alberts had a legitimate expectation of privacy in the search of opaque containers stored on a third person's premises, stated, as three of the four controlling factors, that she (Alberts): (1) had not relinquished her right to the property; (2) owned the property on the third person's

residence with that person's knowledge and permission. Similarly, in the instant case, the petitioner, as the Government alleges, is the owner of the work boots. Moreover, the record does not indicate that the petitioner, once he left the article of clothing in the room, relinquished his right to it. And, finally, the record does not indicate that the petitioner placed the item in his brother's room without his knowledge or permission. Clearly, it cannot be gainsaid that the petitioner lacked a subjective expectation of privacy in the boots found in his brother's room.

Moreover, it is further submitted by the petitioner that the government may not use a consent to a search which was initially described as narrow as a license to conduct a general search. United States vs. Milan-Rodriguez, 759 F.2d 1558, 1563 (11th Cir. 1985). Thus, the District Court was correct in its

original finding that the search of Michael's room was beyond the scope of the consent granted to the police officers.

Accordingly, the Court must reverse the Third Circuit's Judgment Order affirming the District Court's finding that petitioner Chandler could not challenge the seizure of the work boots and ski mask from his brother's room. It is submitted that this petition raises important questions in the area of criminal procedure and search and seizure law. Further, it is urged that this court must consider the questions presented in order to preserve the rights of the accused and regulate the authority of law enforcement agents.

Respectfully submitted,

THOMAS R. ASHLEY
Counsel of Record

RONALD C. HUNT
On the Petition

ASHLEY AND CHARLES
24 Commerce Street
Newark, New Jersey 07102

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

United States of America	:Hon. Harold A. Ackerman
v.	:
GREGORY CHANDLER a/k/a "Shaheed Muhammed", JOHNNY TRAMMEL, a/k/a "T", JAYANT HOOD and ROBERT HILLSMAN	:Crim. No. 85-17
Defendants	**O R D E R**

This matter having been brought before the Court on the motions of the defendants to dismiss the Indictment on the grounds of violations of the Speedy Trial Act, 18 U.S.C. §3161 et seq.; and defendant Chandler being present in court and being represented by Thomas Ashley, Esq.; defendant Hood being present in court and being represented by John Moore, Esq.; and the United States being represented by W. Hunt Dumont, United States Attorney for the District of New Jersey (Michael V. Gilberti, Assistant U. S.

ASHLEY & CHARLES
COUNSELLORS AT LAW
24 COMMERCE STREET
NEWARK, N. J. 07102

THOMAS R. ASHLEY
JOSEPH CHARLES

(201) 623-0501
SUITE 1526

Attorney, appearing); and the Court having heard argument on behalf of the parties and having specifically set forth its findings on the record (dated July 2, 1985); and it appearing that: (a) defendants Chandler and Hood, both personally and through counsel, withdrew without prejudice their motions to dismiss the Indictment at Crim. No. 85-17 on the ground of violation of the provisions of the Speedy Trial Act; (b) the Government's having made an oral application to have the Speedy Trial time computed, and the Court having granted that application; (c) the Court having indicated its intention of advising the parties of its computation by letter (the defendants, after full explanation of their rights, having waived appearance to have the Court state the computation on the record in open court); and (d) defendant Hood having, after a full explanation of his rights concerning representation, indi-

cated his desire to maintain the services of his attorney John Moore, Esquire; and for good cause shown,

IT IS on this 16th day of July, 1985,

ORDERED that the defendants' motions to dismiss the Indictment on grounds of violation of the Speedy Trial Act, 18 U.S.C. §3161 et seq. are withdrawn without prejudice.

IT IS FURTHER ORDERED that the period from June 30, 1985 (the date on which the defendant Hood's motion to dismiss the Indictment was filed) and July 30, 1985 (the date on which the defendants' other pretrial motions will be heard) is reasonable under all circumstances, is excludable and will be excluded from calculation under the provisions of the Speedy Trial Act.

IT IS FURTHER ORDERED that the periods of excludable time (including the time from June 30, 1985 to July 30, 1985 set forth above) applicable to one defendant are applicable to all

defendants as to whom no severance has been granted under the provisions of 18 U.S.C. §3161(h)(7).

IT IS FURTHER ORDERED that the oral application of the United States for a computation of the time remaining under the Speedy Trial Act is granted, and the Court will, by letter, advise the parties of its computation.

IT IS FURTHER ORDERED that all of the defendants' pretrial motions shall be returnable at 9:00 a.m. on July 30, 1985.

/s/ Harold A. Ackerman
HAROLD A. ACKERMAN
United States District Court
District of New Jersey

0407G/3

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA :Hon. Harold A. Ackerman

v. : Criminal No. 85-17

GREGORY CHANDLER, ET AL. : **ORDER**

This matter having been brought before the Court on the motions of the defendants to dismiss the Indictment on the grounds of violations of the Speedy Trial Act, 18 U.S. C. § 3161 et seq. ; and defendants, Gregory Chandler, by his attorney Thomas Ashley, Esq., appearing, and John Hood, by his attorney, John Moore, Esq., appearing, and the United States being represented by Thomas W. Greelish, United States Attorney for the District of New Jersey (Edward J. Bilinkas, Assistant U.S. Attorney, appearing), and the Court having heard argument on behalf of all parties and having carefully reviewed

the papers submitted by all parties; and having carefully considered this matter;

IT IS on this 24th day of September, 1985:

O R D E R E D that the defendants' motions to dismiss the Indictment on the grounds of violation of the Speedy Trial Act, 18 U.S.C. § 3161 et seq. is hereby denied.

/s/ Harold A. Ackerman
HONORABLE HAROLD A. ACKERMAN
Judge, United States District Court

0407G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Hon. Harold A. Ackerman
v.	:	Criminal No. 85-17
GREGORY CHANDLER, ET AL	:	O R D E R

This matter having been brought before the Court on July 30 and 31, 1985 on behalf of the defendants, Gregory Chandler, by his Attorney Thomas Ashley, Esq., appearing, and John Hood, by his attorney, John Moore, Esq., appearing, and the United States being represented by Thomas W. Greenlish, United States Attorney for the District of New Jersey (Edward J. Bilinkas, Assistant U.S. Attorney, appearing), for the purpose of hearing defendants pretrial motions in the above captioned case, and after hearing numerous witnesses testify, and having heard oral argument from all counsel, and after reviewing all counsels'

proposed findings of fact and conclusions of law, and having carefully considered the matter;

IT IS on this 24th day of September, 1985:

O R D E R E D that defendants' motions for a Bill of Particulars, Severance, Witness List and Grand Jury Information is hereby denied; and it is further

O R D E R E D that the Government must turn over any informant information three days before trial; and it is further

O R D E R E D that the Government turn over any Brady and Giglio material in accordance with Rule 16 of the Federal Rules of Criminal Procedure; and it is further

O R D E R E D that defendant John Hood's motion to suppress his statements is hereby denied; and it is further

O R D E R E D that defendant Gregory Chandler's motion to suppress the ski mask and work boots found in his mother's apartment is hereby

granted.

/s/ Harold A. Ackerman
HONORABLE HAROLD A. ACKERMAN
Judge, United States District Court

0407/4

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Honorable Harold A. Ackerman

v. : Criminal No. 85-17

GREGORY CHANDLER, ET AL. : **O R D E R**

This matter having been brought before the Court on behalf of the United States, Thomas W. Greenlish, United States Attorney for the District of New Jersey (Edward J. Bilinkas, Assistant U.S. Attorney, appearing), and Thomas Ashley, Esq., appearing on behalf of defendant Gregory Chandler, and John Moore, Esq., appearing on behalf of defendant John Hood, for reconsideration of the September 4, 1985 Order of the Court suppressing the ski mask and work boots seized from Gregory Chandler's mother's apartment, and after hearing additional testimony and argument from all parties, and having carefully considered this matter;

IT IS on this 24th day of September, 1985;

O R D E R E D that the Government's Motion is hereby granted and that the Government may introduce into evidence the ski mask and work boots during the trial of the above-captioned case.

/s/ Harold A. Ackerman
HONORABLE HAROLD A. ACKERMAN
Judge, United States District Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5793

UNITED STATES OF AMERICA

V.

CHANDLER, GREGORY

GREGORY CHANDLER,
Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 85-00017-01)
District Judge: Hon. Harold A. Ackerman

Submitted Under Third Circuit Rule 12(6)
July 31, 1986
Before: ALDISERT, Chief Judge, and
HIGGINBOTHAM, Circuit Judge,
and RE, Chief Judge

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*Honorable Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

JUDGMENT ORDER

This case came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6).

Appellant, Gregory Chandler, claims that (1) the district court's computation of the seventy day period between the filing of the indictment and the trial was clearly erroneous; (2) the district court erred in not granting his motion for a judgment of acquittal on the basis of insufficient evidence; (3) the district court abused its discretion by finding that his arrest was justified by probable cause and exigent circumstances; (4) the district court's finding that the search of his apartment did not violate the fourth amendment was clearly erroneous; and (5, the district court abused its discretion by allowing evidence of other crimes, wrongs or acts to be admitted into evidence.

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

/s/ A. Lein Higginbotham /s/
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Aug. 7, 1986

Certified as a true copy and issued in lieu of a formal mandate on October 8, 1986.

Test: M. Elizabeth Ferguson

Chief, Deputy Clerk, United States Court of Appeals, for the Third Circuit.

C O P Y

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5793

UNITED STATES OF AMERICA

V.

GREGORY CHANDLER
Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, Circuit Judge

The petition for rehearing filed by Gregory Chandler, Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. Lein Higginbotham
Circuit Judge

Dated: September 26, 1985

THE COURT: Let the record reflect defendants are present with Counsel and we are here today at the Court's request in order for a decision to be rendered with respect to various Motions that were made by defendants, including a Motion to Suppress which required testimony to be taken by the Court.

There is one other matter which I will take up with Counsel at the end of my decision, so I would ask your indulgence.

This is a criminal action brought by the United States against Gregory Chandler and John Hood. The Grand Jury returned an indictment on January 17, 1985 against these defendants alleging a conspiracy to rob certain banks by force, violence and intimidation in violation of 18 U.S.C. Section 2113(a) and, as against each defendant, two counts of armed robbery of certain Federally insured banks, in violation of 18 U..C. Section 2113(a) and (2).

This matter is presently before me on numerous Pretrial Motions filed by defendants both pro se and through Counsel. I will consider these Motions seriatim and by category.

Bill of Particulars; Both defendants have moved for a Bill of Particulars Defendants seek the specific times, places and facts of all transactions relevant to each count of the indictment, all witnesses to the alleged acts, any unnamed co-conspirators, and any overt acts of the alleged conspiracy not set forth in the indictment.

After considering defendants' requests and in light of the nature of the indictment and the material already available for inspection by Defense Counsel, I have decided to deny this request.

The purpose of a Bill of Particulars is "to inform the defendant of the nature of the charges against him to adequately prepare his defense, to avoid surprise during the trial and to protect him

against a second prosecution of an inadequately described offense." U.S. v. Addonizio, 451 F.2d49, 63-64 (3d Cir.) cert.denied 405 U.S. 936 (1972). A Bill of Particulars is thus appropriate where "the indictment itself is too vague and indefinite for such purposes." See U.S. v. Addonizio quoting U.S. v. Haskins, 345 F.2d 111,114 (6th Cir. 1965). The granting of a Bill of Particulars is in the discretion of the Trial Judge. See Addonizio at Page 64. Although it "is still firmly established . .. that a defendant is (not) entitled . . .to a wholesale discovery of the government's evidence." See U. S. v. Addonizio.

Here, I find that defendants have not met their burdens in establishing a need for the requested information. Indeed, it appears that their Motion approaches a "set of detailed interrogatories in the guise of a bill of particulars" such as was condemned by the Court in

U.S. v. Kenny, 465 F.2d 1205, 1212 (3d Cir) cert. denied 409 U.S. 914 (1972).

The indictment provides adequate notice of the factual bases for the charges and the defendants have received abundant discovery to supplement the facts contained in the indictment. I will, therefore, deny defendants' Motion for a Bill of Particulars.

Severance. Both defendants have also made Motions for severance pursuant to Federal Rule of Criminal Procedure 8(b). In support of his Motion, Defendant Chandler argues that joinder of Chandler with his codefendants was improper as there is no showing that the defendants participated in the same acts or transactions constituting the alleged offense. Defendant Chandler is named in Count I of the indictment (the conspiracy charge), in Count II (the November 24th robbery) and in Count III (the December

27th robbery), but is not named in Count IV (the January 7th robbery).

Defendant Hood is named in Count I, Count II and Count IV but not in Count III. Defendants also contend that the joinder of defendants in a criminal trial is improper absent a showing that the defendants have participated in the same act or transactions or in the same series of acts or transactions' constituting the offense. See U.S. v.Aruda, 715 F.2d 671, 676 (2d Cir. 1983), and that there has been no showing here.

Defendants rely heavily on the case of U.S. v. Satterfield, 548 F. 2d 1341 (9th Cir. 1977). In Satterfield the Court held that where the co-defendant was involved in all five bank robberies charged in the indictment, but the appellant was involved in only two of them, joinder of the two in the same indictment was improper.

I find, however, that Satterfield, supra, is inapposite here. As the Government correctly points out, Satterfield explicity limits its holding at the beginning of its Opinion stating: "(I)t was never alleged that Satterfield was involved in the first, second and fifth robberies, whether as a participant in a common plan or in any other manner....The indictment, moreover, did not charge the defendants with conspiracy." See Satterfield, 548 F.2d at 1343.

In a conspiracy charge, such as the one here alleged, the Third Circuit has explicity allowed joinder of a defendant who is not named in all counts of the indictment. In United States v. Dickens, 695 F.2d 765, 779 (3d Cir. 1982), the Court stated: "Where the Government charges multiple defendants with a single conspiracy, the interests of judicial

economy usually favor a single trial. U.S. v. Jackson, 649 F.2d 967 (3d Cir. 1961). The possibility that evidence will be admissible against some but not all defendants does not require severance." U.S. v. Kenny, 462 F.2d 1205 (3d Cir.); cert denied 409 U.S. 914 (1972).

The Third Circuit has also expressed a clear preference in conspiracy cases "to have all of the parties tried together so that the full extent of the conspiracy may be developed." U.S. v. Provenzano, 688 F.2d 194, 199 (3d Cir. (1982). Motions for severance also rest in the sound discretion of the Trial Judge. U.S. v. Boyd, 595 F2.d 120, 125 (3d Cir. 1978).

The indictment clearly charges as interrelationship between defendant to the conspiracy. Thus, neither under Satterfield nor Third Circuit case law is a severance justified based on these grounds.

Defendant Chandler argues in the alternative that, even if defendants are properly joined under Rule 8 (b), Defendant Chandler is prejudiced by the joinder and is entitled to severance pursuant to Federal Rule of Criminal Procedure 14.

Such a Motion is a matter within the Court's discretion. U.S. v. Barber, 442 F.2d 517, (3d Cir. 1970), cert denied, 404 U.S. 958 (1971).

Defendant Chandler alleges he will be prejudiced by his association at trial with Mr. Hood because Mr. Hood has already given a statement to the FBI confessing his guilt. (This statement is the subject of a Suppression Motion which I will discuss subsequently.) Mr. Chandler contends that he will be unable to avoid "guilt by association" as he does not deny knowing the man but does deny being involved in any criminal

activities with him or anybody else.

Although Mr. Hood did make statements to the FBI implicating Mr. Chandler, the Government has represented that they will not seek to introduce any statement made by Mr. Hood, implicating Mr. Chandler. See July 30, 1985 transcript at Page 27, 1.19. Thus, any problems under Bruton v. U.S., 391 U.S. 123 (1968) are avoided.

Both because there are no Bruton problems posed by this situation, the case is not very complex and each bank robbery alleged is easily distinguishable from the others, I do not find that Mr. Chandler would be prejudiced by the use of Mr. Hood' statement at a joint trial.

The Third Circuit has held in U.S. v. Dansker, 537 F.2d 40, 62 (3d Cir. 1976), that a defendant is not entitled to a severance merely on the basis of a disparity in the strength or the evidence

against a codefendant. Instead, a defendant must show that the evidence is so complex or confusing that a jury could not "compartmentalize" it and consider it only for its proper purposes. See U.S. v. Dansker and U. S. v. DeLarosa 450 F.2d 1057 (3d Cir. 1971).

Defendant Chandler has not established that the evidence is of this character or that the jury will have any difficulty in compartmentalizing Defendant Hood's statements.

Discovery:

A. Witness List: Defendants have requested the Government to produce their witness list. They concede, however, that there is no right to a list of Government witnesses. See U.S. v. Addonizio, 451 F.2d 49, 64 (3d Cir. 1972). The Court may, however, in its discretion order discovery of such a list upon a movant's showing of great

need and a showing of lack of prejudice to the Government. See Will v. U.S., 389 U.S. 90, 99 (1967).

Defendants allege that their need for this list is great because the discovery materials made available to them failed to implicate them in any criminal activities. I do not agree with defendants that this need for a witness list is great. Significant discovery materials have been turned over to them and the facts alleged are not so unusually complex that defendants cannot surmise who most of the Government witnesses will be.

B. Informant List: Defendant also requests production of the names of any Government informants and the disclosure of any relevant criminal background and financial information on these informants. Defendant Chandler believes that the paucity of evidence against

him indicates that confidential informants will be testifying at trial, and that these informants were active participants in the conspiracy and other offenses charged in the indictment. The background and financial information is sought for the purposes of checking such informant's credibility.

In Rosario v. U.S. 353 U.S. 53 (1957), the Supreme Court acknowledged a limited exception to the usual rule of nondisclosure of informants, stating that disclosure would be proper "where the disclosure of an informer's identity, or of the contents of his communications, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause...."353 U.S. at 60-61. In weighing whether to permit such disclosure, a Court must examine the particular circumstances of a case "taking into consideration

the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." See Rovario at Page 62.

In United States v. Jiles, 658 F.2d 194 (3d Cir. 1981), the Third Circuit identified three types of cases concerning informants. The first type is where the informant played an active and crucial role in the events underlying the defendant's criminal liability. There disclosure of the informant will most probably be required to ensure a fair trial. The second type of case is where the informant was not an active participant or eyewitness, but merely a tipster. There is generally no need to disclose such an informant. Lastly, there is the large mass of cases falling in between these categories where balancing the factors becomes crucial. In this

balancing, the burden falls upon the defendant to show a specific need for disclosure. See Page 197 of the Jiles Opinion. This determination may not rest upon "the more speculation that an eyewitness may have some evidence helpful to the defendant's case...," but rather there must be some specific articulation of the need.

I find that Defendant Chandler has carried the burden of showing a specific need for information on any confidential informant who will testify at trial. Defendant Hood, however, has pointed out no cirucmstances demonstrating his particular need for such disclosure. To prevent possible harassment or intimidation of any witness, however, I will order the Government to turn over the names of any confidential informants who will testify against Defendant Chandler at trial only three

business days before the start of trial. Any criminal background or financial information already in the Government's possession must also be turned over at that time, but the Government is not required to do defendant's investigative work.

C. Brady Material: Any evidence known to the Prosecution which tends to exculpate a defendant must be made available to the accused. See Brady v. Maryland, 373 U.S. 83 (1963). Any promises of benefits made by the Government to a witness is within the scope of the Brady doctrine. Giglio v. U.S., 504 U.S. 150, 154 (1972). This Court has discretionary authority to order pretrial disclosure of such material. See U.S. v. Higgs, 713 F.2d 39 (3d Cir. 1983)

The Government has informed these chambers exparte that such material was

turned over to defendants following oral argument of this Motion. There is then, no need to rule on this Motion. I note only that the Government must exercise reasonable diligence in continuing to turn over any additional material of this nature they may discover.

D. Production of Rule 16 (a) (1) (A) Material.

The Government has also produced any material within the purview of Federal Rule of Criminal Procedure 16(a)(1) (A).

Grand Jury. Defendants seek the attendance and voting records of the Grand Jurors who considered the evidence in this case and the Grand Jury testimony of all witnesses.

Defendants rely on U.S. v. Provezano, 688 F. 2d 194 (ed Cir.) cert. denied 450 U.S. 10[illegible] (1982) to justify examination of the atttendance and voting records. Provenzano investigation where

evidence was submitted to successive Grand Juries. In that case, the Third Circuit reaffirmed the usual view "the criminal process must not be bogged down by extensive pretrial review of Grand Jury activity. U.S. v. Calandra, 414 U.S. 338 (1974); Costella v. U.S., 350 U.S. 359 (1956).* 688 F.2d at 202. In this case, the Grand Jury returned the indictment ten days after the last of the three bank robberies charged. There is simply no need for the requested records in such a case.

The defendants have, likewise, not demonstrated the compelling necessity for the Grand Jury testimony requested to justify an intrusion into the secrecy of a Grand Jury. See U.S. v. Rose, 215 F.2d 617, 628 (3d Cir. 1954) and Pittsburgh Plate Glass Co. v. U.S., 360 U.S. 395, 399 (1959).

In Liminie Evidence Issues.

Defendants also seek to have various evidentiary issues resolved before trial. I find these requests to be premature. The trial is not expected to be unduly complex or lengthy, thus, the disposition of all of these issues as they arise at trial will not delay or prejudice defendants.

Defendants have withdrawn their requests for a **Wade** hearing and a Franks v. Delaware hearing because neither is applicable to the facts of this case.

Chandler Suppression Motion.

Defendant Chandler also moves to suppress his arrest and the evidence seized following the arrest. On July 30 and 31, 1985, I held a suppression hearing on this issue. During the suppression hearing, the United States presented the testimony

of FBI Special Agent John P. Fallon, Newark Police Detective Bobby J. Colicelli, and FBI Special Agent Gary J. Rohen. Defendant Chandler presented the testimony of Dolores Stover, Gloria Chandler, Michael Paul Chandler and Lucindia Renee Hayes.

I make the following findings of fact based on this testimony:

On January 8, 1985, based on an anonymous tip, members of the Newark Police Department and the FBI went to Codefendant's Johnny Trammell's apartment, located at 515 Elizabeth Avenue in Newark, New Jersey, at about 11:05 A.M. The car in which they arrived was unmarked. Trammell's apartment number was 25C.

After the agents knocked on the door identified themselves, Mr. Trammell admitted them into the apartment. The agents advised Trammell of his rights, and Trammell indicated that he understood

them. Trammell then agreed to talk to the agents about a series of bank robberies.

Dolores Stover was Trammell's girl friend and the owner of a 1976 white Ford Grenada. While speaking to Trammell, the detectives learned that Ms. Stover owned a 1976 white Ford Grenada and that it was being repaired downstairs. A car meeting that description was used as a getaway car in the November 24, 1984 robbery.

Detective Colicelli went downstairs and found a bumper that had been removed from the car which had decals on it matching the description provided by witnesses from the November 24, 1984 bank robbery.

The agents then confronted Trammell with the fact that they had located both the bumper and getaway car used during the November 24th robbery. Trammell voluntarily confessed to his involvement in a series of bank robberies.

One of the detectives, Scott-Bey, knew that Chandler was on parole for bank robbery.

After Trammell implicated Chandler, he stated that Chandler was probably aware of the fact that the police were in the building. After arresting Trammell, Detectives Colicelli and Scott-Bey left Trammell's apartment and went to Apartment 17C, which was the apartment which Trammell indicated was Chandler's.

While Collicelli and Scott-Bey remained outside Chandler's apartment, Detective Rohen contacted the U.S. Attorney's Office and received oral authorization to arrest Chandler.

Following the authorization, the detectives knocked on the door and announced who they were. They heard shuffling noises coming from within the apartment. A female voice then refused

to open the door and requested the detectives to produce a search warrant.

No search warrant was ever produced. But after a few minutes, Renee Hayes, Chandler's girlfriend, opened the door anyway. I find Renee Hayes' testimony that the police threatened to knock the door down a complete fabrication.

After the door was opened, Gregory Chandler was arrested, advised of his rights and handcuffed. Chandler was then transported back to the robbery squad's headquarters at 22 Franklin Street, Newark, in a police unit.

Lieutenant Payne, Detective Colicelli's superior, sent him down to the robbery squad to obtain consent to search forms. Special Agent Rohen testified that it takes less time to get a consent to search form than to get a search warrant

Michael Chandler is the brother of Gregory Chandler, and was present

in the apartment at the time of Gregory Chandler's arrest. Michael Chandler was awakened by Renee Hayes after Gregory Chandler was arrested. When he came out of the front room, Special Agent Rohen explained what had just occurred and asked Michael if he would consent to a search of the apartment. Michael responded that the consent could only be given by his mother, Gloria Chandler, who was at the hospital visiting her husband at the time.

Mrs. Chandler was contacted by phone at approximately 1:00 P.M. Michael informed her that the FBI were in her home and had just arrested Gregory Chandler. He told her the police were requesting consent to search the apartment. Special Agent Rohen spoke to her also and advised her that she was not required to consent, and if she did not consent,

the police would attempt to obtain a search warrant.

I find the testimony of Gloria Chandler and Michael Chandler that the police threatened to "tear the place apart" if consent to search was not given, to be completely incredible and a lie fabricated after the fact to assist Gregory Chandler.

After Agent Rohen spoke to Mrs. Chandler, Michael got back on the phone. Mrs. Chandler instructed him to allow the police to search only Gregory Chandler's room. She instructed Michael to sign the consent form, but only insofar as Gregory's room was concerned.

Detective Colicelli's testimony that he overheard bits and pieces of this phone conversation is a fabrication, as he had left to obtain consent forms by this time. No one sought Defendant Gregory Chandler's consent to search

his room at any time.

Defendant Chandler pays rent to his parents of approximately $25 a week and shares the bedroom with his 14-year-old son and his girl friend. Mrs. Chandler has a general right of access to Defendant Chandler's room and on occasion cleans it for him also.

After Michael Chandler signed the consent form, the police searched the entire apartment. Michael Chandler attempted to watch the agents search but they kept ordering him to sit down in the front room. There were approximately six to eight officers searching the house.

The agents seized a burgundy Serucci jacket, an all white jacket and a pair of work boots and a ski mask lying next to the work boots from Michael Chandler's room. While there is conflicting tesimony whether the $2,050 was found

under Gregory Chandler's mattress or in a red suitcase, I am satisfied that the money found by the police was found in Gregory Chandler's room.

Numerous legal issues have been raised by Defendant Chandler arising out of the above events.

Defendant Chandler's first contention is that probable cause to arrest Chandler was the fruit of an illegal entry and warrantless arrest of Codefendant Trammell. In support of this argument, defendant relies primarily on the "fruit of the poisonous tree" doctrine of Wong Sun v. U.S., 371, U.S. 471 (1962).

I find that Defendant Trammell consented to the entry of the police officers into his apartment and that the officers did have probable cause to arrest Defendant Trammell; therefore, his arrest and subsequent statements were not illegally obtained.

Although the existence of probable cause must be determined with reference to the facts of each case, in general, probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient in and of themselves to warrant a person of reasonable caution in the belief that, 1) an offense has been committed, 2) by the person to be arrested. See Dunaway v. N.Y., 442 U.S. 200,208 (1979).

In Brinegar v. U.S., 338 U.S. 160 (1949), the Court stated: "(i)n dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." See Brinegar at Page 175.

After Trammell voluntarily admitted the officers to his apartment, he was advised of his rights and voluntarily chose to talk to the officers. The officers had a lead sheet that someone by the name of "T", with a girl friend named "D", living at Trammell's address might have been involved in the robberies they were investigating. The officers located the car that met eyewitness descriptions of the robbery getaway car, and Trammell confessed to being involved in the robbery. Such evidence would clearly lead a reasonable and prudent person to believe Trammell had been involved in the bank robberies.

Thus, I conclude, the information about Chandler obtained from Trammell is not the fruit of a poisonous tree as defendant contends.

Defendant next alleges that the arrest of Defendant Chandler was not based on probable cause. I find

that the police did indeed have probable cause to arrest Defendant Chandler.

The officers had received detailed information from Trammell regarding Chandler's involvement in the robberies. The two men resided in the same building, which would bolster Trammell's credibility that they collaborated, and Scott-Bey knew that Chandler was on parole for an earlier bank robbery. Probable cause can rest upon the collective knowledge of the police rather than solely on that of the officer who actually makes the arrest when there is some degree of communication between the two. See U.S. v. Webster, 756 F.2d 367 (5th Cir. 1974), which then, was here.

Thirdly, Defendant Chandler argues that his warrantless arrest inside his home was improper. Generally, "the Fourth Amendment... prohibits the police from making a warrantless and nonconsentual entry into

a suspect's home in order to make a routine felony arrest." Payton v. N.Y., 445 U.S. 573 (1980). A warrantless entry and arrest is, however, proper if, when viewed against all of the available facts, exigent circumstances exist. See Welsh v. Wisconsin, 104 S. Ct. 2091, 2097 (1984).

A search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show the presence of "exigent circumstances." See Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971). The Supreme Court declined to consider the scope of any exception for exigent circumstances that might justify home warrantless arrests, see Payton at 583, thereby leaving to the lower Courts the initial application of the exigent circumstances exception.

"Prior decisions of (the Supreme Court), however, have emphasized that

exceptions to the warrant requirement are 'few in number and carefully delineated,' and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." Welsh supra at 4584, citing U.S. v. U. S. District Court, 407 U.S. at 318.

One such emergency situation specifically recognized by the Court is the danger of destruction of evidence while an arrest warrant is being obtained. See Schmerber v. California, 384 U.S. 757, 770-71 (1966). The nature of the underlying offense is also an important factor to be considered in the exigent circumstances calculus. See Dorman v. U.S., 435 F.2d 385, 392 (D.C. Cir. 1970) (en banc), cited approvingly in Welsh, supra, at 4584-4585.

The vast majority of Courts

have based their findings on the criteria enunciated in Dorman v. U.S., supra:

1. The gravity of the crime which a suspect is believed to have committed;

2. The reasonable belief that the suspect is armed;

3. The degree of probable cause for the arrest;

4. The likelihood that the suspect is in the premises;

5. The risk of escape; and

6. The manner of entry by the police.

An analysis under each of these factors leads me to conclude that the agents' warrantless entry and arrest of defendant was justified under the exigent circumstances exception. The crime suspected was grave; there was reason to believe that defendant might be armed; the agents had probable cause to arrest defendant; there was no reason

to believe defendant was justified under the exigent circumstances exception. The crime suspected was grave; there was reason to believe that defendant might be armed; the agents had probable cause to arrest defendant; there was no reason to believe defendant was not on the premises, and some indication from Trammell to believe that he was; the shuffling of the apartment and the probability that Chandler knew the police were there indicated the risk of escape or the destruction of evidence; and, the manner of entry was not by force.

Once the agents were in the apartment and had arrested Chandler, these same exigent circumstances justified the agents remaining in the apartment while consent to search was obtained. In Segura v. U.S., 104 S. Ct. 3380 (1984), the Supreme Court held that where agents, having probable cause, enter premises,

and with probable cause, arrest the occupants, they may secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant. In this case, the agents preserved the status quo while consent to search was obtained. Consent to search is the equivalent of a search warrant where such consent is freely and voluntarily given. See Bumper v. North Carolina, 391. U.S. 543 (1968).

Defendant contends that the search of defendant's home was not valid, and, in the alternative, tht such search exceeded the scope of the consent.

One of the well-established exceptions to the warrant and probable cause requirements is a search conducted pursuant to consent. See Bumper, supra. Consent may be given by a suspect by either word or act, but the words or

conduct must be unambiguous. See, for example, U.S. v. Jabara, 618 F.2d 1319, 1325 (9th Cir.), cert. denied, 449 U.S. 856 (1980). The Government always bears the burden of proof to establish consent. See Florida v. Royer, 460 U.S. 491 (1983).

Consent is always more of a factual issue than a legal question, see Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and the test for proving consent is a preponderance of the evidence. See U.S. v. Lopez-Diaz, 630 F.2d 661 (9th Cir. 1980).

Permission to search may be obtained from a third party who possess common authority or other sufficient relationship to the premises or effects sought to be inspected. See U.S. v. Matlock, 415 U.S. 1964 (1974). Where the consent to search is given by a third party, it must be clear that the third party has authority to give it.

See Stoner v. California, 376 U.S. 483 (1964).

I find that Mrs. Gloria Chandler had authority to consent to a search of any room in the apartment. She exercised common authority over the room in which Gregory Chandler slept, in spite of the fact that Gregory paid her rent. Gregory Chandler resided in the apartment at the sufferance of his mother.

I also find that Mrs. Chandler's consent was freely and voluntarily given.

The scope of the search to which Mrs. Chandler consented, however, was limited solely to Gregory Chandler's bedroom. Mrs. Chandler explicity stated to Agent Rohen that only Gregory Chandler's room could be searched, and she instructed her son, Michael, to limit the search to that room also.

Because the credible testimony demonstrates that all items except the

money found in Gregory Chandler's room must be suppressed. This includes the work boots, the jackets and the ski mask. The general rummaging that resulted in the discovery of these items were impermissible under the Fourth Amendment.

Hood Suppression Hearing. Defendant Hood moves to suppress statements made by him to FBI agents on January 11 and 14, 1985, under Miranda v. Arizona, 384. U.S. 36 (1966).

On January 11, 1985, Special Agent John Fallon and several other agents arrested John Hood pursuant to an arrest warrant issued in Newark, New Jersey. It is alleged by Special Agent Fallon that Defendant Hood confessed to being involved in two robberies while in the FBI's custody. The FBI agents took oral statements from Mr. Hood and later reduced them to writing. It is conceded that Hood had ample time to

write out his own statement, but Special Agent Fallon testified that he felt more confident in his writing ability than in Defendant's Hood's.

Defendant Hood argues that the failure of the

Rohen - direct

Q Did he give you specific details with regards to any of these three bank robberies?

A Yes sir, I was attempting to ascertain specific facts on each of the bank robberies, and Mr. Trammell provided information on the bank robbery which occurred the day before on January 7 at the Berkeley Federal Savings and Loan at 78 Lyons Avenue in Newark; tht he admitted committing along with Mr. Hood.

He then proceeded to backtrack to December 27, the robbery of the Midlantic National Bank at 185 Ferry Street and then the robbery at the same bank on November 24,1984. He provided detailed

clothing descriptions, escape routes, where they met and so forth.

Q At that point did Mr. Trammell implicate Gregory Chandler?

A Yes , sir, he did.

Q Did he indicate where Mr. Chandler resided?

A Yes sir. He indicated that Mr. Chandler resided in the same building in apartment 17K.

Q Did he indicate any other statements with regards to Mr. Chandler?

A Yes, sir. He indicated that Mr. Chandler probably knew that we were in the building and probably wouldn't remain around as we had parked the unmarked FBI car in front of the building.

Q At the time that Mr. Trammell made these statements did you know personally that Gregory Chandler was on parole for bank robbery?

A Yes, sir, I did.

Q After those statements were made by Mr. Trammell, did any police officers go to Mr. Chandler's apartment?

A Yes, sir. I requested detectives Colicelli and Scott-Bey to secure the outside or to remain outside the apartment of Gregory Chandler while I attempted to contact the U.S. Attorney's office for oral authorization to arrest Mr. Chandler.

Q Did you in fact attempt to contact the U.S.Attorney's office?

A Yes, sir I did.

Q Did you speak with an assistant United States Attorney at that time?

A Yes, sir I did.

Q Did you receive oral authorization from an assistant United States Attorney to arrest Mr. Chandler?

MR. ASHLEY: Your Honor, I've been -- since there's no jury I've haven't

really objected to the leading questions, but this is really getting extremely leading now. He can tell what he did without Mr. Bilinkas providing all the details.

THE COURT: The question is did you receive oral authorization from the United States Attorney. That is not leading.

MR. ASHLEY: Yes, sir.

THE COURT: He either did or didn't.

MR. ASHLEY: My point is once the phone call is made the next question is what was the conversation. This certainly puts it --

THE COURT: Unfortunately the cow is out of the barn, and you're trying to shut the door.

MR. ASHLEY: Yes, sir.

THE COURT: Proceed

Q Did you receive oral authorization from an assistant United States Attorney to arrest Gregory Chandler?

A Yes, sir, I did.

Q Did you communicate that fact to any other police officer or federal agent on the scene?

A Yes, sir. I attempted to contact Detective Scott-Bey and Colicelli using a Newark police radio.

Q To the best of your knowledge was Gregory Chandler arrested soon after?

A Yes, sir, he was.

Q After Mr. Chandler was arrested what, if anything, did you do?

A I went down to apartment 17K and observed Mr. Chandler at that location. I likewise advised him that he was under arrest for bank robbery, and I advised him of his rights orally.

Q What was done with Mr. Chandler at that point?

A Mr. Chandler was transported to the Newark Police Department robbery squad.

Q By whom, sir?

Q And after receiving the authorization to arrest Mr. Chandler they then effectuated that arrest?

A Yes, sir, that's correct.

Q Now, when you --when they entered the apartment and made the arrest of Mr. Chandler, when you were there Mr. Chandler had been taken to the Newark police department?

A He had not been taken down prior to my coming down stairs to 17K. I physically saw Mr. Chandler at apartment 17K prior to his being transported to the Newark Police Department.

Q Now, when Mr. Chandler was in the apartment and you walked into the apartment, had anybody in the apartment given you authorization to enter their premises at all?

A Not until I spoke to Michael Chandler.

Q I'm not talking about the search, I'm talking about just to enter this private dwelling. Did anybody to your knowledge give you or Officer Bey or Officer Colicelli any right to walk in the apartment itself?

A I have no way of knowing what transpired before I came downstairs.

Q When -- when Mr. Chandler then was taken back to the Newark Police Department did you remain in the apartment?

A Yes, sir, I did.

Q Now, did anybody give you any right to remain in the apartment?

A I explained what I was doing there to Michael Chandler. I discussed why we had arrested Gregory Chandler. I spoke to the other two people who were present, as I've previously testified to, and indicated that I was asking for their cooperation in continuing the investigation and would like their cooperation in gaining a consent to search for specific items.

Q Did anybody tell you that you could still remain in the apartment?

A Michael Chandler continued to be cooperative.

Q But did anybody give you the right to stay there and continue to be there for the period of time that it took them to take Mr. Chandler to the police station and come back with the consent to search? That's my question.

A While they were getting the consent to search forms the conversation with Mrs. Chandler had transpired, I had additional conversation with Michael and I had effected the oral authorization for the consent search from Mrs. Chandler. Then we waited for the forms.

Q So, you're saying at no time while you were present at the apartment after Officer Colicelli left, and before he returned, did anybody tell you that you had to leave or you should get out or you had no right to be here? No one said anything like that

in your presence?

A No sir, they did not.

Q Did you have any part in making the decision not to obtain a search warrant?

A Sir, due to the circumstances that were present on that particular day, and the desire to effect the apprehension of two other unknown subjects and to preserve any evidence, the first course of action would be to attempt to obtain the cooperation of the resident with the consent to search. I also had planned if this was not feasible to get a search warrant to make application to a U.S. magistrate.

Q But my question is different. My question is simply, did you have -- did you take any part in the decision not to obtain a search warrant? Just calls for a yes or no, if you will, sir. Did you play a part in that decision?

A Sir, I can't answer that yes or no. The preferred course of action would be the

cooperation of the residents to consent to a search. If they had any problem with that we would present our probable cause to an U.S. magistrate and obtain a federal search warrant for the resident.

Q Isn't it a fact that before the officers left with Mr. Chandler nobody every indicated to you or anybody else that they were willing to consent to have the apartment searched? Isn't that a fact?

A Before the officers left?

Q That's correct.

A No, sir.

Q So you're saying that before the officers left that Michael Chandler indicated to you that he was prepared to consent to the search of the apartment?

A We still needed the consent forms for another apartment that we had intended to visit and to search.

Q No, but my question is before Officer Colicelli left with Michael Chandler--

with Gregory Chandler, did anybody tell you that, yes, we're willing to consent to the search of the apartment? That's my question.

A No, sir, they did not.

Q Why was there not a warrant sought rather than take the same time to obtain a consent to search?

A As I indicated, my decision based on the exigency of the circumstances, the fact we had two other unknown subjects we would like to apprehend, the fact we were concerned with the destruction of any evidence, that the preferred course of action would be to obtain the consent of the owner of the apartment to effect the search and if they had any problem with that we would present probable cause to a U.S.magistrate and obtain a search warrant.

Q You say exigency, was there any real fear that the evidence would be destroyed

in the presence of Police Officer Bey with at least two or three police officers outside an open door to the apartment? Was there any real fear the evidence would be destroyed?

A There was a concern that the evidence could be moved around, there was a concern that the evidence could be misplaced. Bear in mind that no one was restrained during this period. People were asked to cooperate. And they had free movement throughout the apartment. We did not sit people down and say you cannot move. They were not physically restrained, they were asked to cooperate.

Q What were you looking for?

A We were looking for money, masks, clothing and possible weapons.

Q Did you think that the people in the presence of Officer Bey who was inside the apartment and in the presence of three other men outside or two other

men, that realistically ski masks, money and other items of clothing could be destroyed while he was sitting there and therefore it was necessary to avoid the warrant required.

A Bear in mind that we did not extend any protective search past the living room. And as I indicated, these individuals were free to move around. The window is open it's very easy to drop items out. Everyone who was present, all of the officers and agents have had experience where subjects have dropped evidence out of windows. Particularly, when operating in these high rise projects in the City of Newark.

Q Could this not have happened in the 30 minutes to an hour that it took to come back with the consent to search?

A Yes, it could have.

Q So really the considerations involved in obtaining the consent to search were

no different than the considerations involved in obtaining a search warrant, just a matter of which procedure would be employed, is that correct?

A It was a matter of time.

Q So you're saying it would have been faster to obtain a consent to search than to obtain a search warrant that's the reason why the warrant requirement was avoided and ignored here because it was faster?

A It wasn't --

MR. BILINKAS: Objection as to form.

MR. ASHLEY: Well, Judge, I don't know what the objection is but I'll rephrase it.

Q You're saying then that it took less time to obtain this consent to search and, therefore, no warrant was obtained?

A I'm saying based on the facts present I decided to request the cooperation

of the residents and obtain the consent to search as opposed to appearing before a judge, preparing an affidavit and returning with the search warrant.

Q But my question is,my question is different. My question is, you are saying in effect that it took less time to obtain the consent to search than to obtain a search warrant, and, therefore, you obtained a consent to search, is that correct? Yes, or no, please.

A Yes, sir. Time wise it took less time to get a consent to search.

Q But certainly during that period of time the possibilities of destruction of evidence and all the other terrible things that may have occurred existed nevertheless?

A Yes, sir, they did.

Q Now, when you entered the apartment can you tell me approximately how long it took Officer Colicelli to come back

with the consent to search forms from the time that they left until the time they actually came back? Can you tell me what the span of time was?

A I could give you an estimate. I would say maybe 15, 20 minutes.

Q And when you arrived, when you came back and first spoke to Michael Chandler, is that correct?

A I'm sorry, would you repeat the question?

Q When these officers came back the first conversation was had, that was had was had with Michael Chandler, is that correct?

THE COURT: It seems to me, Mr. Ashley you got the question answered awhile ago.

MR. ASHLEY: I don't see there is any further questions that I have.

THE COURT: All right. Here's what I'm going to do. It's twenty after three. Give me until a quarter to four.

I'll come back here at a quarter of four and I'll decide these two remaining issues in the case.

MR. ASHLEY: Thank you, Judge.

THE COURT: Marshals, have the man down here at a quarter to four.

Thank you.

(Recess.)

THE COURT: The government has brought a motion for reconsideration of part of my earlier ruling rendered on September 4, 1985, in which I ordered the suppression of a ski mask and work boots found by the government in defendant's apartment.

The government contends that the ski mask and work boots should not be suppressed on two alternate grounds as follows:

First, that the evidence in the record does not support the Court's conclusion that the ski mask was found

in Michael Chandler's bedroom and, two, that even if the evidence in the record could support such a conclusion, there is no legal basis to suppress this evidence because Gregory Chandler has no standing to object to evidence seized from another person's room in which he has in expectation of privacy.

After rereading the testimony presented on July 30th and 31st and listening to the testimony presented here today, I find that the credible testimony is that the work boots were found in Michael Chandler's bedroom and the ski mask was found in Gregory Chandler's bedroom inside his bureau drawer.

I turn first to the issue of the suppression of the work boots. I find that under Rakus versus Illinois Gregory Chandler has no standing to suppress the work boots found in Michael Chandler's room.

There is absolutely no testimony on the record to support defendant Chandler's allegations of an expectation of privacy in his brother's room. To the contrary, any testimony on this issue indicates that Gregory Chandler could not expect any privacy for any possession he left in Michael Chandler's room.

Gregory Chandler and Michael Chandler both testified they paid rent and had their own separate rooms.

Mrs. Chandler, as I found in my earlier opinion, went into both sons' bedrooms to clean. In such a factual setting, any interest Gregory Chandler might have had in Michael Chandler's room is too remote to amount to a Fourth Amendment privacy interest. See also U.S. versus Salvucci, 448 U.S., page 83 at page 93 (1980) and Katz versus the United States, 389 U.S. 347 (1967). See also Government of the Virgin Islands versus

Frederico, Third Circuit slip opinion July 24, 1984.

The work boots are, therefore, admissible. And I regret that I did not perceive this issue originally.

I turn next to the question of the ski mask. I find any allegation that the ski mask was planted in Gregory Chandler's room unsupported by the testimony. I will not suppress the mask on that basis.

I have previously found that the search of defendant Chandler's room was legal, as pursuant to Mrs. Chandler's consent, as no testimony has been presented at all to raise even the inference that Mrs. Chandler's authority and control did not extend as far as her son's bureau drawers. I find the scope of Mrs. Chandler's consent and authority to consent did extend to the drawer in which the ski mask, this black ski mask, was found.

Because the search of the drawer was legal, the ski mask will not be suppressed.

Turning to defendant's motion to dismiss this action under the Speedy Trial Act, I find that defendant was brought to trial within the time allowed under the Speedy Trial Act. I have already entered my findings as to what time was excludable. Having done so, I reiterate my findings in that regard for all reasons previously stated.

Mr. Bilinkas, would you draw two orders which reflect my two additional rulings today?

MR. BILINKAS: Yes, Judge.

THE COURT: Tomorrow morning, of course, we'll swear the jury in. Then we will proceed with the trial of this case.

MR. BILINKAS: Thank you Judge.

MR. ASHLEY: Yes, sir. You want us here at what time, your Honor?

THE COURT: Ten o'clock.

Good afternoon. Thank you very much.

MR. ASHLEY: Your Honor, there are two housekeeping motions.

THE COURT: Let Mr. Chandler sit down.

Just a minute. Please be seated, gentlemen.

MR. ASHLEY: Your Honor, one application is that I ask that I be permitted to have a daily copy under the Federal Rules becausethis case involves the testimony now of apparently three men who admit to having robbed the various banks in issue; who now----

THE COURT: Granted. Okay.

(2)

No. 86-1709

In the Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY CHANDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

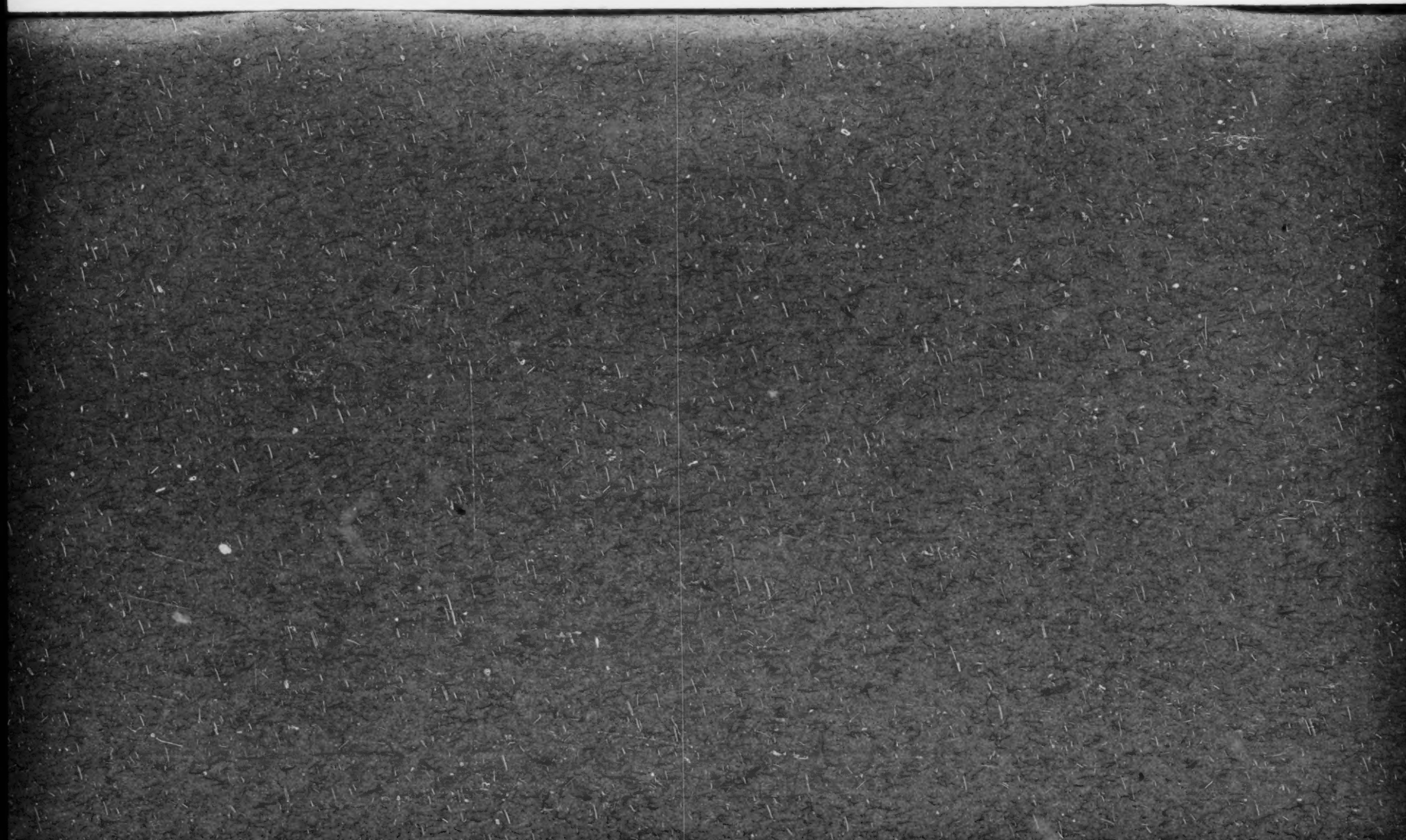
CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

19pp



QUESTIONS PRESENTED

1. Whether petitioner was tried within 70 days of indictment, as required by the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.*

2. Whether evidence seized from petitioner's mother's apartment should have been suppressed.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 12-14) is reported at 800 F.2d 1140 (Table). The orders of the district court denying petitioner's motions to dismiss for a violation of the Speedy Trial Act and to suppress evidence (Pet. App. 1-11) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12-14) was entered on August 7, 1986, and a peti-

tion for rehearing was denied on September 26, 1986. The petition for a writ of certiorari was filed as of November 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of bank robbery (Counts 2 and 3), in violation of 18 U.S.C. 2113(a), and conspiracy to commit bank robbery (Count 1), in violation of 18 U.S.C. 371. He was sentenced to consecutive terms of 20 years' imprisonment on the two bank robbery counts and a concurrent term of five years' imprisonment on the conspiracy count. The court of appeals affirmed by judgment order (Pet. App. 12-14).

1. The evidence at trial, the sufficiency of which is not in dispute, showed that on November 23, 1984, petitioner suggested to two of his neighbors, Johnny Trammell and John Hood, that they rob the Midlantic National Bank in Newark, New Jersey.[1] Petitioner explained his plan and assigned the tasks. He instructed Trammell to borrow his girlfriend's 1976 Ford Grenada as the getaway car. That evening, they borrowed a BB gun from petitioner's brother-in-law. At 8:30 the next morning, they drove the Grenada to the bank, donned their ski masks, and robbed the bank of $9,696.

One month later, on December 27, 1984, petitioner called Trammell and said that he wanted to rob the bank again. On that occasion, they were joined by Robert Hillsman, who drove them to the bank in his

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[1] The factual summary is taken from the government's brief in the court of appeals.

blue van. Hillsman stayed outside as petitioner and Trammell put on their ski masks, walked into the bank, pulled the gun, and threatened the employees. Petitioner jumped over the counter and took $9,812. They fled in Hillsman's van.

2. On January 8, 1985, Trammell was interviewed by two police officers and two FBI agents in his apartment, at which time he confessed to the robberies. He identified petitioner as the mastermind and told the officers that petitioner lived with his mother in the same apartment building and was probably aware of their presence. The officers then went to the Chandler apartment to arrest petitioner. When they knocked on the door and identified themselves, they heard people shuffling around inside. A woman refused to admit the officers and asked through the closed door whether they had a warrant. After additional conversation, the woman agreed to admit the officers. When she opened the door, the officers saw petitioner standing a few feet from the doorway. Petitioner was arrested and taken to the local police station. Pet. App. 35-38.

The officers then asked petitioner's brother, Michael, if he would consent to a search of the apartment. He replied that only his mother could give the necessary consent. Michael telephoned his mother and told her that the FBI had arrested petitioner and was requesting consent to search the apartment. An FBI agent explained to Mrs. Chandler that she was not required to consent to the search and that, if she did not do so, they would attempt to obtain a search warrant. Petitioner's mother agreed to the search. She instructed Michael to sign the consent form and to permit the officers to search only petitioner's room. Pet. App. 38-40. The officers searched the room and

found $2,050 in cash and a black ski mask. They also seized a pair of work boots from Michael's bedroom. *Id.* at 73-74.

3. Petitioner moved to suppress the cash, ski mask and work boots seized from his mother's apartment. Following an evidentiary hearing, the district court held that the warrantless entry into the Chandler apartment was justified by exigent circumstances (Pet. App. 48-49). The court also held that the search of petitioner's room was justified by Mrs. Chandler's consent. The court concluded that Mrs. Chandler had authority to consent to the search because she enjoyed "a general right of access to [petitioner's] room and on occasion clean[ed] it for him also" (*id.* at 41, 52). The court further determined that Mrs. Chandler had voluntarily given her consent to the search. In particular, the court found the testimony of Michael and Mrs. Chandler "that the police threatened to 'tear the place apart' if consent to search was not given, to be completely incredible and a lie fabricated after the fact to assist [petitioner]" (*id.* at 40). The court accordingly denied petitioner's suppression motion insofar as it pertained to the cash, which was seized from petitioner's room (*id.* at 52).

The court initially suppressed the mask and work boots on the ground that they had been taken from Michael's room without consent (Pet. App. 41, 53). On reconsideration, however, the court concluded that the agents had actually found the ski mask in petitioner's room and that it therefore was lawfully seized pursuant to Mrs. Chandler's consent (*id.* at 73-74). With respect to the boots, which were seized from Michael's room, the district court found "absolutely no testimony on the record to support [peti-

tioner's] allegations of an expectation of privacy in his brother's room. To the contrary, any testimony on this issue indicates that [petitioner] could not expect any privacy for any possession he left in Michael Chandler's room" (*id.* at 71-72). Accordingly, the court held that petitioner was not entitled to suppression of evidence taken from that room (*id.* at 70-73).

4. The district court also denied petitioner's motion to dismiss the indictment for violation of the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.* In a July 12, 1985, letter to counsel (App., *infra*, 1a-4a), the district court made detailed speedy trial calculations up to that date. The court stated that the 70-day period began to run on February 4, 1985, which was the date of co-defendant Hood's first court appearance in the charging district. See 18 U.S.C. 3161(c)(1).[2] Forty-one speedy trial days elapsed before the clock stopped on March 18, 1985, when petitioner had a bail hearing and moved to relieve his court-appointed attorney. That motion was granted three days later. The district court excluded the next four days, while the court sought new counsel for petitioner, under the ends-of-justice provision, 18 U.S.C. 3161(h)(8)(A). The court counted the next day, March 25, toward the 70-day total, but found that the clock stopped the following day when petitioner filed various pro se pretrial motions. App.,

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[2] The district court erroneously stated that February 4, 1985, also was the date of petitioner's first appearance in the district (App., *infra*, 2a). In fact, petitioner was arrested and taken before a federal magistrate on January 9, 1985. See Appellee's C.A. App. 2. As explained below (see note 3, *infra*), however, this error does not affect the calculation of the speedy trial period, which ran from the date of co-defendant Hood's first appearance in the district.

infra, 2a. From that point forward, every day was found to be excludable: additional motions were filed, continuances were granted, and hearings were postponed to accommodate defense counsel (*id.* at 2a-4a). Thus, by the court's tabulations, only 42 speedy trial days had elapsed as of July 12 (*id.* at 4a).

The district court conducted a hearing on the pending pretrial motions on July 30 and 31, 1985, and then requested additional briefing on some motions. The last brief was submitted on August 28, 1985. The district court found that all the delay up to and including that date was excludable under 18 U.S.C. 3161(h)(1)(F), the pretrial motion provision of the Speedy Trial Act. 9/4/85 Tr. 27. The court rendered its decision on the pretrial motions on September 4, 1985, and excluded the days between August 29 and the date of decision as time during which the motions were under advisement (see 18 U.S.C. 3161(h)(1)(J)). 9/4/85 Tr. 27. On September 6, 1985, the government filed a motion to reconsider the district court's suppression ruling. A hearing on that motion was conducted after trial began on September 10, 1985.

ARGUMENT

1. Petitioner first contends (Pet. 8-20) that the district court miscalculated the excludable portion of the period between his indictment and trial for purposes of the Speedy Trial Act and that his trial commenced more than 70 non-excludable days after indictment. However, the district court's calculations, which are summarized above (see pages 5-6, *supra*), were entirely accurate.

Petitioner makes several errors in his own calculations. For example, he fails to take into account the

excludable delay attributable to his co-defendant (see 18 U.S.C. 3161(h)(7)),[3] and he fails to exclude the "ends-of-justice" continuance granted by the district court pursuant to 18 U.S.C. 3161(h)(8)(A). See pages 5-6, *supra*. But most importantly, petitioner incorrectly asserts (Pet. 12-15) that only so much of the delay between the filing of a pretrial motion and the hearing on the motion that is "reasonably necessary" may be excluded under 18 U.S.C. 3161(h)(1)(F). As this Court held in *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), slip op. 5-9, however, Section 3161(h)(1)(F) excludes, without qualification, the entire period between the date on which the motion was filed and the receipt of all post-hearing submissions. Under this controlling interpretation, the district court's determination that only 42 non-excludable days elapsed prior to trial was clearly correct.

2. Petitioner also challenges the district court's rulings on his suppression motion. Petitioner first objects (Pet. 24-26) to the factual determination by the district court that his mother's consent to the search of his room was voluntary. Petitioner argues (Pet. 25) that the district court should have credited the testimony of Michael and Mrs. Chandler that the officers "threatened to wreck the apartment if Mrs. Chandler did not consent." The district court re-

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[3] Thus, contrary to petitioner's contention (Pet. 10-11), the 70-day period did not begin to run on January 17, 1985, when the indictment was returned. It instead began on February 4, 1985, when petitioner's co-defendant, who was arrested in the Northern District of Georgia (Appellee's C.A. Br. 4), first appeared before a judicial officer in the District of New Jersey. 18 U.S.C. 3161(h)(1)(G) and (H). Compare *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), slip op. 10.

jected this testimony as a "fabrication" (Pet. App. 40) and instead credited the officers' testimony, finding that Mrs. Chandler had "freely and voluntarily" given her consent (*id.* at 52). This finding of fact, which was concurred in by both courts below, is not clearly erroneous and does not warrant review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner next challenges (Pet. 26-30) the district court's finding that Mrs. Chandler had access to and common authority over petitioner's bedroom in her apartment and therefore had authority to consent to a search of that room (Pet. App. 52). Petitioner does not, however, dispute the legal proposition that permission to search may be given by one who "possesse[s] common authority over or other sufficient relationship to the premises * * * sought to be inspected" (*United States* v. *Matlock*, 415 U.S. 164, 171 (1974) (footnote omitted)), and he points to no testimony supporting his claim that he had exclusive access to his room. Under these circumstances, the district court's factual finding, which was sustained by the court of appeals, does not warrant review.

Finally, petitioner argues (Pet. 33) that the work boots seized from his brother Michael's room should have been suppressed because petitioner had a "subjective expectation of privacy in the boots." But to assert a Fourth Amendment claim, petitioner must have had a legitimate expectation of privacy in the place searched, not merely a possessory interest in the objects seized. *United States* v. *Salvucci*, 448 U.S. 83, 91-93 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). The district court therefore properly refused to suppress the evidence seized from Michael's bedroom.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

JUNE 1987

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
HAROLD A. ACKERMAN
Judge

July 12, 1985

Thomas R. Ashley, Esq.
Ashley & Charles
24 Commerce Street
Newark, New Jersey 07102

John A. Moore, Esq.
574 Newark Avenue
Jersey City, New Jersey 07306

Michael Gilberti, AUSA
Department of Justice
Rodino Federal Building
Newark, New Jersey 07102

Re: U. S. A. v. Chandler & Hood
Criminal Action No. 85-17

Gentlemen:

As I told you yesterday at the hearing, I will detail the excludable time thus far under the Speedy Trial Clock for the above-named defendants in this letter. I shall issue my reasoning for these exclusions in a written opinion at a later date.

My records show the following pertinent periods of time:

January 17, 1985—Indictment filed for both Chandler and Hood.

February 4, 1985—First appearance in this district for both Chandler and Hood. Date from which 70 day period is calculated pursuant to 28 U.S.C. § 3161(c)(1).

March 18, 1985—Chandler bail hearing; Chandler motion to be relieved of Neary as counsel. 41 days have run on the clock.

March 21, 1985—Order entered relieving Neary as counsel (3/18 - 3/21 excludable as pretrial motion pursuant to 18 U.S.C. § 3161(h)(1)(F)).

March 25, 1985—Order appointing Thomas Ashley counsel for Chandler. (3/21 - 3/25 excludable in order to allow court to obtain new CJA attorney pursuant to § 3161(h)(8)(A)).

March 27, 1985—*Pro se* pretrial motions filed by Chandler. 42 days have now run on the clock.

April 3, 1985—Additional *pro se* motions filed by Chandler.

April 4, 1985—Chandler affidavit in support of motions filed.

April 5, 1985—Defendants requested a continuance in which to file motions. Continuance granted until April 19, 1985, and later extended to April 22, 1985 (3/27 - 4/5 excludable pursuant to § 3161(h)(1)(F) and 4/5 - 4/22 excludable pursuant to § 3161(h)(8)(A)).

April 10, 1985—Motion by Hood for New CJA counsel. Motion by Chandler for a reduction of bail. Order entered excluding April 10, 1985 to May 24, 1985 in order to obtain new counsel for Hood and afford new counsel time to prepare.

April 24, 1985—Mr. Moore's request for extension of time to prepare and submit motions on Hood's be-

half. Continuance allowed pursuant to § 3161(h)(8)(A).

May 10, 1985—Hood pretrial motions filed by his attorney.

May 15, 1985—United States filed its response to defendants' motions.

May 28, 1985—United States filed a supplemental response.

May 31, 1985—Hearing on both defendants' motions was scheduled. Because counsel for defendant Chandler was unavailable and either counsel for Chandler or counsel for Hood were unavailable on other dates suggested by the court, hearing was adjourned to June 18, 1985 (3/10 - 6/18 excludable pursuant to § 3161(h)(1)(F) and § 3161(h)(8)(A) to allow defendants continuity of counsel and to ready the motions for judicial determination.)

June 5, 1985—Hood motion filed *pro se* requesting that he be allowed to proceed *pro se* to trial.

June 27, 1985—Hood *pro se* motion to reduce bail.

July 1, 1985—Hood motion by his attorney to dismiss complaint based on Speedy Trial Act grounds.

July 5, 1985—Chandler motion by his attorney to dismiss based on Speedy Trial Act.

July 10, 1985—Hearing on defendants' motion to dismiss on Speedy Trial Act grounds.

July 11, 1985—Hearing continued. Hearing held on defendant Hood's motion to proceed *pro se*. Defendant Hood withdrew motion to proceed *pro se* and defendants Chandler and Hood both withdrew motions to dismiss based on Speedy Trial Act. (6/5 - 7/11 excludable pursuant to § 3161(h)(1)(F) to dispose of Hood motion to proceed *pro se*) 7/1-7/11 excludable to dispose of Speedy Trial Act motion).

July 15, 1985—Chandler bail reduction hearing scheduled.

July 16, 1985—Hood bail reduction hearing scheduled. (6/27 - 7/16 excludable as to pretrial motion to reduce bail.)

I have concluded that only 42 days have run on the Speedy Trial Calendar. An order will be entered to this effect. I am presently reviewing all motions filed by both defendants, both those filed *pro se* and by appointed counsel, and, as you know, I have set them down for a hearing on July 30 and 31, 1985. I will, of course, attempt to dispose of all remaining motions as promptly and expeditiously as is possible in light of the volume of motions that have been filed thus far.

Very truly yours,

HAROLD A. ACKERMAN
U.S.D.J.

HAA:jap

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